Supreme Court, U.S.
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No. 93-1562

In the Supreme Court of the United States

OCTOBER TERM, 1993

MR. SPROUT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission erred in declining to revoke a regulatory exemption for the transportation of petitioners' potatoes by respondent Consolidated Rail Corporation (Conrail).

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OPINIONS BELOW

The opinion of the court of appeals is reported at 8 F.3d 118 (Pet. App. B1-B30). The decision of the Interstate Commerce Commission is reported at 8 I.C.C. 2d 674 (Pet. App. C1-C47).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1993. The petition for rehearing was denied on January 3, 1994. Pet. App. A1-A2. The petition for a writ of certiorari was filed on April 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the railroad exemption provisions of 49 U.S.C. 10505, which were enacted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31, as modified and supplemented by the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895. Section 10505(a) directs the Interstate Commerce Commission (ICC or Commission) to exempt railroad activities from regulation whenever it finds (1) that regulation is not necessary to carry out the rail transportation policy goals set forth in 49 U.S.C. 10101a, and (2) either that (A) the exemption is of limited scope, or (B) regulation is not necessary to protect shippers from an abuse of market power. 49 U.S.C. 10505(a). By using mandatory lang-uage and providing that the ICC "shall" exempt rail service when the statutory criteria are met, Section 10505 was designed to reduce regulation to the minimum necessary to carry out national rail transportation policy goals. See, *e.g.*, H.R. Rep. No. 1430, 96th Cong., 2d. Sess. 105 (1980) (instructing the ICC to use Section 10505 to "reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power.").

In 49 U.S.C. 10701a(b)(1), a provision of the Interstate Commerce Act added by the Staggers Act, Congress further provided that maximum rate regulation by the Commission is inappropriate except to the extent that a carrier has "market dominance" over the traffic at issue. 49 U.S.C. 10701a(b)(1). Market dominance is defined in 49 U.S.C. 10709(a) as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. 10709(a). The statute also provides that common

carriers shall not unreasonably discriminate against shippers. "Unreasonabl[e] discriminat[ion]" in rates is defined as the imposition of different rates by carriers for "performing a like and contemporaneous service" in the transportation of a "like kind of traffic under substantially similar circumstances." 49 U.S.C. 10741(a). There can be no unreasonable discrimination if different rates are imposed for different routes. 49 U.S.C. 10741(f)(4).

Pursuant to 49 U.S.C. 10505, the ICC has issued numerous exemptions from regulation, either individually or as a class, for a variety of selected services, transactions, and commodities, including railroad shipments of potatoes. However, the statute gives the Commission the authority to revoke an exemption, either wholly or in part, if and when it finds that regulation is necessary to carry out the national rail transportation goals of Section 10101a. 49 U.S.C. 10505(d). This case involves the ICC's decision not to revoke the regulatory exemption as it applies to potatoes carried for petitioners by Consolidated Rail Corporation (Conrail).

2. Petitioners are a group of closely-affiliated produce dealers operating out of New York City. Petitioners contract with respondent Conrail to transport potatoes originating in Idaho to their final destination at distribution facilities in and around New York City. Pet. App. B3, C7. Since the early 1980's, petitioners have filed numerous loss and damage claims against Conrail and its predecessors seeking compensation for economic losses due to alleged spoilage of their potato shipments. See 49 U.S.C. 10730 and 11707 (authorizing loss and damage suits). Pet. App. B3, C8-C10. To cover the cost of defending against petitioners' claims, respondent Conrail increased its rates in 1983 by $500 to $600 per car on petitioners' traffic. *Id.* at B4, C10-C11.

3. Petitioners filed suit against respondent Conrail in March 1984 in New Jersey district court seeking revocation of respondent's regulatory exemption for transportation of potatoes. Petitioners argued that Conrail had abused its market power by selectively increasing rail rates on petitioners' traffic.[1] Based on an ICC decision asserting the agency's exclusive jurisdiction over exempted rail transportation, the district court dismissed the complaint, and the dismissal was upheld by the Third Circuit. Pet. App. B4-B5. See *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 646 F.Supp. 511 (D.N.J. 1986), aff'd, 830 F.2d 1230 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988).

4. Petitioners then petitioned the ICC to revoke the exemption for potato traffic as to Conrail and to order Conrail to reduce its rates on petitioners' traffic. They based their revocation petition on their claims that Conrail's rates for petitioners' traffic were unreasonably discriminatory and an abuse of market power and that Conrail's claims investigation practices were fraudulent and unreasonable. An Administrative Law Judge (ALJ) concluded that the exemption should be revoked. The judge found that "there is no doubt that [favored competitors] exist," and that Conrail had market power which it had abused by charging discriminatory rates. See Pet. App. C22.

5. The ICC reversed. Pet. App. C1-C47. First, noting that Conrail's rates on western potatoes barely covered its out-of-pocket costs, the ICC found that Conrail does not possess, and hence could not abuse, market power on this traffic. *Id.* at C17-C21. Second, the ICC held that petitioners had failed to make out a prima facie case that

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[1] One other railroad imposed similar rate increases, but petitioners have focused only on Conrail in their petition for certiorari.

Conrail's rates unreasonably discriminated against them in a manner that caused petitioners competitive injury, because petitioners had not even identified any of their competitors or their competitors' transportation routes. *Id.* at C22-C24, C27-C28.[2] The Commission further disagreed with the ALJ's conclusion that petitioners had proved competitive injury resulting from the rate increase. Rather, the Commission concluded that petitioners had failed to show that they had suffered any decline in business or in market share following imposition of the surcharge. *Id.* at C24-C27. Finally, the Commission found that Conrail had demonstrated that its rates for petitioners' traffic were justified by "different transportation circumstances"—i.e., the extraordinary expense of serving petitioners that was traceable to the filing of numerous loss-and-damages claims. *Id.* at C28-C30. Relying on the Third Circuit's previous decision in *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1233 (1987), the ICC noted that the statute did not prohibit rail carriers from taking into account the cost of loss-and-damage

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[2] The Commission described unreasonable discrimination under 49 U.S.C. 10741(a) as follows (Pet. App. C21-C22):

> Discrimination is defined as charging different rates for like traffic and services. Longstanding case law has established that, to prove unreasonable discrimination, a complainant must show that a rate disparity exists between the rates it pays and the rates charged to its competitors; that there is actual or potential competitive injury; that the defendant is the common source of both the prejudicial and preferential rate; and that the rate disparity is not justified by transportation conditions. Once the first three elements are shown, the burden shifts to the defendant to show that the rate disparity is justified by transportation conditions. See, *e.g.*, *Dresser Indus.* v. *ICC*, 714 F.2d 588[, 598] (5th Cir. 1983).

claims in fixing transportation rates for particular customers. Pet. App. C29-C30. Because Conrail's conduct would not have been unlawful even in the absence of the exemption, the ICC found that it provided no basis for revocation.

6. The Second Circuit affirmed in part and reversed in part.[3] Pet. App. B1-B30. The court agreed that a threshold inquiry in determining whether rates should be regulated under the statute is whether the carrier has market power, and it affirmed the ICC's holding that Conrail's low rates show a lack of market power. *Id.* at B10-B16. Second, the court affirmed the ICC's finding that petitioners had failed to make out a prima facie case of discrimination under Section 10741. After noting the elements of a prima facie case, the court explained that:

> Petitioners submitted no evidence about who their competitors are, which rail lines their competitors are on, what their competitors sell and which markets they serve, what carriers their competitors use, or what rates their competitors paid.

Pet. App. B18. The court also agreed with the Commission that petitioners had failed to show competitive injury because there was no evidence that their potato distribution business had been harmed by Conrail's rate hike. *Id.* at B19-B20. Finally, the court upheld the agency's finding that Conrail had justified the rate differential in light of the unusual costs of serving petitioners. *Id.* at B21-B23.

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[3] The court remanded to the Commission for the limited purpose of determining whether the carrier's method of investigating claims constituted an unreasonable practice under 49 U.S.C. 10701(a). At petitioners' request, the ICC has held the remanded proceeding in abeyance pending disposition of the petition for certiorari.

ARGUMENT

Petitioners contend that the court of appeals should have revoked respondent Conrail's exemption from regulation because Conrail engaged in "unlawful and discriminatory charging practices." See Pet. 19. The court of appeals' decision is correct, and involves a straightforward application of statutory standards to the facts of this case. No further review is warranted.

As the court of appeals noted, the ICC's application of the exemption provisions at issue is entitled to "the same deferential standard of review as that afforded to other agency proceedings." Pet. App. B9 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984)). Petitioners do not challenge the ICC's conclusion that they failed to demonstrate that respondent Conrail possessed market power over the transportation of petitioners' potatoes, see Pet. 12 n.3. Rather, their sole contention is that the rate increase imposed on petitioners' traffic constitutes unlawful rate discrimination under Section 10741(a) of the Interstate Commerce Act, which would justify revocation of the exemption from regulation under Section 10505(d).

The court of appeals agreed with the Commission, however, that petitioners failed to make out a prima facie case with respect to each of the three elements of a discrimination claim under 49 U.S.C. 10741(a), see note 2, *supra*. Specifically, the court noted that petitioners submitted "no evidence" about the identity or market activities of their competitors. Pet. App. B18. The court of appeals explained that, without this information, the ICC "was unable to make a finding that the same carriers served the unnamed competitors or that an alleged rate differential caused competitive harm to

[petitioners]." *Ibid.* Petitioners do not challenge the court's conclusion that they failed to identify their competitors, nor do they explain why the requirement that they identify their competitors is unreasonable in light of their claim that their business suffered competitive injury. Rather petitioners simply repeat the assertion that the imposition of a higher rate on shipments of their potatoes suffices to establish competitive injury. Pet. 26. The court of appeals' rejection of this argument is correct and does not warrant further review.

Petitioners also challenge (Pet. 25-26) the Commission's conclusion that they failed to establish an essential element of their prima facie case of discrimination because they did not prove that their business was significantly impaired following Conrail's rate increase. Petitioners' challenge rests on nothing more than a disagreement with the Commission's assessment of the evidentiary record. As the court of appeals found, however, the Commission's conclusion that petitioners suffered no overall decline in their business following the rate increase is supported by substantial evidence in the record.[4] See Pet. App. C25. Petitioners' fact-bound disagreement with that finding does not merit further review.[5]

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[4] Petitioners stated that rail shipments dropped during the year after the rate increase was imposed. But the ICC noted that rail shipments during the year before the increase were unusually high, and that the drop in shipments simply represented a return to historic levels. The ICC also noted that five of petitioners' seven largest customers, representing 83 % of their total business, bought more potatoes from petitioners after the rate increase than they did during the previous two years. Pet. App. C25.

[5] Petitioners also argue that the Commission should have found competitive injury based on the fact that they raised the prices of

Petitioners also argue (Pet. 22-24) that the Commission erred in its analysis of the "different routes" aspect of the antidiscrimination provisions of 49 U.S.C. 10741.[6] The Commission concluded, and the court of appeals agreed, that petitioners could have no claim of discrimination under Section 10741(f), because no other distributor shipped potatoes to Kingsbridge, which was petitioners' "primary point of receipt." Pet. App. C23, B20. But even if, as petitioners claim, the Commission erred in its factual conclusions regarding the sites at which petitioners received their potatoes, it would make no difference to the outcome of this case. The Commission's finding of no discrimination ultimately rested on its conclusion that petitioners suffered no decline in business, and no competitive injury, from the increase in rates. Thus, the "different routes" analysis is not essential to the outcome in this case.

Lastly, petitioners argue (Pet. 27-28) that the court of appeals erred in upholding the ICC's determination that the expenses incurred by Conrail in responding to petitioners' loss-and-damage claims justified a rate increase. Petitioners maintain that raising rates to cover the cost of petitioners' claims had the effect of "depriv[ing] [petitioners] of their statutory right to file claims." Pet. App. B22. As the Third Circuit noted, however, in rejecting a similar claim at a previous stage

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their product as a result of Conrail's rate increase. Pet. 25-27. But a price increase, standing alone, does not prove competitive injury: as the ICC noted, petitioners failed to show that Conrail's rate increase (or petitioners' price increase) actually resulted in lost business.

[6] In the Staggers Act, Congress expressly limited the statutory prohibition against unreasonable discrimination by specifying that it "shall not apply to * * * rail rates applicable to different routes." 49 U.S.C. 10741(f)(4).

in this case, "[r]ecovery in those pending [loss-and-damage] actions * * * will not be affected by the [rates] here challenged." *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d at 1233. The Third Circuit further observed that, although Section 11707 prohibits rail carriers from relieving themselves of the cost of paying loss or damage claims, "it simply does not deal with what costs may be taken in account in determining rates." *Ibid.* The court stated that there is "no authority—statutory, regulatory, or judicial—for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates." *Ibid.* The Court concluded that a carrier is therefore not barred from raising rates to cover the expenses of loss or damage claims. Petitioners cite no authority to the contrary. In any event, as the court of appeals in the instant case pointed out, Pet. App. B21, Conrail was not required to justify the rate it charged petitioners because, by failing to show competitive injury, petitioners did not present a prima facie case of rate discrimination. Thus, this case does not turn on whether rates may be raised to cover the cost of loss and damage claims, and that question merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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